

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 FUTUREWISE,

3
4 Petitioner,

5 v.

6
7 WHATCOM COUNTY,

8
9 Respondent,

10 and

11
12 GOLD STAR RESORTS, INC,

13
14 Intervenor.

Case No. 05-2-0013

**ORDER FINDING COMPLIANCE
ON CONCLUSION OF LAW K**

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16 **I. SYNOPSIS**

17 THIS Matter came before the Board on a compliance hearing held telephonically on July 31,
18 2007. Karen Frakes, Deputy Prosecuting Attorney, appeared representing the County.
19 Jeremy Anderson represented Futurewise. All three board members attended.
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22 **II. PROCEDURAL BACKGROUND**

23 The Petition for Review was filed in this case on March 25, 2005. On September 20, 2005,
24 the Board entered its Final Decision and Order, finding that Resolution No. 2005-006 and
25 the ordinances adopted through it failed to comply with the Growth Management Act (GMA)
26 with respect to the descriptors for and designations of small towns, crossroads commercial,
27 resort and recreational subdivisions, suburban enclaves and transportation corridors
28 (Conclusions of Law D, E and H); Policy 2GG-2 (Conclusion of Law G); zoning designations
29 RR1, RR2, RR3, EI, R2A, and RRI (Conclusion of Law I); and UR 3 zone in urban areas
30 other than the Lake Whatcom Watershed and the Airport/Marine Drive Mixed Use area
31 (Conclusion of Law K).
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1 The Board's decision with respect to Conclusions of Law D, E, G, H and I were appealed to
2 the Whatcom County Superior Court. The Superior Court reversed the Board's decision on
3 these issues. The decision of the Superior Court was, in turn, appealed to the Court of
4 Appeals, Division I. On August 27, 2007, Division I of the Court of Appeals reversed the
5 Superior Court.¹
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7 Conclusion of Law K was not appealed and is the subject of this compliance order. At the
8 County's request, the compliance period was extended on May 17, 2007 to allow the
9 County to adopt Ordinance #2007-030, amending the Whatcom County Zoning Map.
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11 **III. BURDEN OF PROOF**

12 After a board has entered a finding of non-compliance, the local jurisdiction is given a period
13 of time to adopt a legislative enactment to achieve compliance. RCW 36.70A.300(3)(b).
14

15 After the period for compliance has expired, the board is required to hold a hearing to
16 determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and
17 (2). For purposes of board review of the comprehensive plans and development regulations
18 adopted by local governments in response to a non-compliance finding, the presumption of
19 validity applies and the burden is on the challenger to establish that the new adoption is
20 clearly erroneous. RCW 36.70A.320(1),(2) and (3). Only if a finding of invalidity has been
21 entered is the burden on the local jurisdiction to demonstrate that the ordinance or
22 resolution it has enacted in response to the finding of invalidity no longer substantially
23 interferes with the goals of the GMA. RCW 36.70A.320(4). The Board did not find make a
24 finding of invalidity in its September 20, 2005 Final Decision Order; therefore the burden of
25 proof remains with Petitioners.
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28 In order to find the County's action clearly erroneous, the Board must be "left with the firm
29 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
30 121 Wn.2d 179, 201, 849 P.2d 646 (1993).
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¹ *Gold Star Resorts et al. v. Futurewise, et al.*, Docket No. 58379-4.
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2 Within the framework of state goals and requirements, the boards must grant deference to
3 local governments in how they plan for growth:

4 In recognition of the broad range of discretion that may be exercised by counties and
5 cities in how they plan for growth, consistent with the requirements and goals of this
6 chapter, the legislature intends for the boards to grant deference to the counties and
7 cities in how they plan for growth, consistent with the requirements and goals of this
8 chapter. Local comprehensive plans and development regulations require counties
9 and cities to balance priorities and options for action in full consideration of local
10 circumstances. The legislature finds that while this chapter requires local planning to
11 take place within a framework of state goals and requirements, the ultimate burden
12 and responsibility for planning, harmonizing the planning goals of this chapter, and
13 implementing a county's or city's future rests with that community.

14 RCW 36.70A.3201 (in part).

15 In sum, the burden is on the Petitioners to overcome the presumption of validity and
16 demonstrate that any action taken by the County is clearly erroneous in light of the goals
17 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
18 Where not clearly erroneous and thus within the framework of state goals and requirements,
19 the planning choices of the local government must be granted deference.

20 **IV. ISSUES PRESENTED**

21 Do the UR3 zones in urban areas other than the Lake Whatcom Watershed and the
22 Airport/Marine Drive Mixed Use area fail to comply with RCW 36.70A.110 and RCW
23 36.70A.130?

24 **V. DISCUSSION**

25 **Positions of the Parties**

26 The County has submitted Ordinance 2007-030 with its Compliance Report of July 10,
27 2007. Ordinance 2007-030 amends the Whatcom County zoning map to change the zoning
28 of the UR3 zones in the Everson Urban Growth Area to UR 4. The County urges that this
29 complies with the Board's direction in Conclusion of Law K.² Petitioner concurs.³
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² Compliance Report, July 11, 2007 at 1.
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1 The County further submits materials relative to the Lake Padden UR3 zone. The County
2 urges that the UR3 zone is justified due to the location of the area within the Lake Padden
3 watershed.⁴ The County further advises the Board that an ordinance has been introduced
4 to designate the area as a Water Resource Protection Overlay District, Stormwater Special
5 District and Water Resource Special Management Area.⁵ Again, Petitioner has no objection
6 to a finding of compliance on this basis.⁶
7

8 **Board Discussion**

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10 The effect of the change in zoning in Ordinance 2007-030 is to allow densities of 4 dwelling
11 units per acre instead of 3 dwelling units per acre in the Everson Urban Growth Area. This
12 intensity of development is consistent with the County's comprehensive plan designations
13 for urban growth areas. The decision not to change the UR3 zone in the Lake Padden
14 watershed is grounded in the environmentally sensitive nature of the watershed. This is a
15 sufficient reason to allow a lesser level of development intensity in urban areas and
16 overcomes the rebuttable presumption that 4 dwelling units per acre is a minimum urban
17 density.⁷
18

19 **Conclusion:** The change in the UR3 zone in the Everson Urban Growth Area to UR4
20 complies with the requirements for urban densities in urban growth areas in RCW
21 36.70A.110 and the requirement to review the comprehensive plan in RCW 36.70A.130.
22 The decision to retain the UR3 zone in the Lake Padden watershed is based on
23 environmental considerations and also complies with RCW 36.70A.110 and 36.70A.130.
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29 ³ No Objection to Finding of Compliance as to Conclusion of Law K (UR 3 RE-Designations and Rezones),
30 July 19, 2007.

31 ⁴ Compliance Report, July 11, 2007

32 ⁵ *Ibid* and Exhibit 4 to the Compliance Report.

⁶ No Objection to Finding of Compliance as to Conclusion of Law K (UR 3 RE-Designations and Rezones),
July 19, 2007.

⁷ See concurrence of Judge Agid in *Gold Star Resorts et al. v. Futurewise, et al.*, Docket No. 58379-4.

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VI. FINDINGS OF FACT

1. Whatcom County is located west of the crest of the Cascade Mountains and is required to plan according to RCW 36.70A.040.
2. Futurewise was the original petitioner in this case.
3. In the Final Decision and Order, issued September 20, 2006 in this case, the Board found at Conclusion of Law K:
The UR3 zone in urban areas other than the Lake Whatcom Watershed and the Airport/Marine Drive Mixed Use area fails to comply with RCW 36.70A.110 and the failure to revise this zone fails to comply with RCW 36.70A.130.
4. Ordinance 2007-030 was adopted by the Whatcom County Commissioners on June 5, 2007 to achieve compliance with respect to Conclusion of Law K in this case.
5. Whatcom County Ordinance 2007-030 amends the Official Whatcom County Zoning Ordinance map within the Everson Urban Growth Area to change the UR3 zone to UR 4, allowing 4 dwelling units per acre within the urban growth area.
6. Whatcom County has not altered the zoning of the UR3 zone in the Lake Padden watershed due to its environmentally sensitive nature.
7. Whatcom County anticipates adding the Lake Padden watershed as a Water Resource Protection Overlay District, Stormwater Special District and Water Resource Special Management Area but has not yet done so.
8. Petitioner does not object to a finding of compliance on Conclusion of Law K.

VII. CONCLUSIONS OF LAW

- A. The Board has jurisdiction over the parties and subject-matter of this action.
- B. Futurewise has standing to participate in the compliance proceedings since it was an original party to this case.
- C. The adoption of Ordinance 2007-030 achieves compliance with RCW 36.70A.110 and RCW 36.70A.130 with respect to the UR3 zones in the Everson Urban Growth Area.
- D. The zoning of UR3 in the Lake Padden watershed (in the Bellingham Urban

1 Growth Area) complies with RCW 36.70A.110 and RCW 36.70A.130 based on the
2 environmentally sensitive nature of the area.
3

4 **VIII. ORDER**

5 Whatcom County has achieved compliance with respect to Conclusion of Law K of the
6 September 20, 2006 Final Decision and Order. That issue is hereby CLOSED.
7

8 Entered this 30th day of August 2007.
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11 _____
12 Margery Hite, Board Member
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14 _____
15 Holly Gadbaw, Board Member
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17 _____
18 James McNamara, Board Member
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1 Pursuant to RCW 36.70A.300 this is a final order of the Board.

2 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
3 mailing of this Order to file a petition for reconsideration. Petitions for
4 reconsideration shall follow the format set out in WAC 242-02-832. The original and
5 three copies of the petition for reconsideration, together with any argument in
6 support thereof, should be filed by mailing, faxing or delivering the document directly
7 to the Board, with a copy to all other parties of record and their representatives.
8 **Filing means actual receipt of the document at the Board office.** RCW 34.05.010(6),
9 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
filing a petition for judicial review.

10 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
11 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
12 judicial review may be instituted by filing a petition in superior court according to the
13 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil

14 **Enforcement.** The petition for judicial review of this Order shall be filed with the
15 appropriate court and served on the Board, the Office of the Attorney General, and all
16 parties within thirty days after service of the final order, as provided in RCW
17 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
18 but service on the Board means **actual receipt of the document at the Board office**
within thirty days after service of the final order.

19 **Service.** This Order was served on you the day it was deposited in the United States
20 mail. RCW 34.05.010(19)